

STATE OF MICHIGAN
COURT OF APPEALS

CRAIG C. SMITH, CONNIE SMITH, JAMES
NIEMI, and LAURA NIEMI,

UNPUBLISHED
May 5, 2005

Plaintiffs/Counter-Defendants-
Appellees/Cross-Appellants,

v

No. 251523
Livingston Circuit Court
LC No. 00-018130-CH

LIVINGSTON COUNTY DRAIN
COMMISSION, GENEVIEVE JAKUBUS,
MAUREEN JAKUBUS, PERI GAGALIS,
PATTY JO GAGALIS, HARRY COLLINS,
VIRJENE DOHERTY, LORAIN HARWICK,
GERALD RICHARDS, KAREN RICHARDS,
JACK I. COLEMAN, CREAGH MILFORD,
KATHLEEN MILFORD, RICHARD HAAS,
WILLIAM PEET, SHARON PEET, MICHAEL
MCGUIRE, TRESSA MCGUIRE, HAROLD A.
HARTMAN, SHARON K. HARTMAN,
NELSON BAUDER, BERNARD C. SHEEHAN,
and RONALD C. BELL,

Defendants,

and

LIVINGSTON COUNTY ROAD COMMISSION,
PUTNAM TOWNSHIP, and TREASURER OF
MICHIGAN,

Defendants-Appellees,

and

PAUL KING, SANDRA M. KING, JAMES FETT,
MARGARET A. FETT, and JANET HAMLIN-
O'BRIEN,

Defendants/Counter-Plaintiffs,

and

JOAN F. PARKS and MAUVIZ MARY
SHEEHAN,

Defendants/Counter-Plaintiffs-
Cross-Appellees,

and

LEO K. LUCKHARDT and LORENA K.
LUCKHARDT,

Defendants-Cross-Appellees,

and

MICHAEL GRZESIK and CAROL GRZESIK,

Defendants/Counter-Plaintiffs-
Appellants/Cross-Appellees.

Before: Hoekstra, P.J., and Neff and Schuette, JJ.

NEFF, J. (*concurring in part and dissenting in part*).

I concur with the majority's conclusions that affirm, but modify, that part of the trial court's finding regarding the right and obligations to maintain a dock at the end of Alley No. 5, and affirm the trial court's order granting a temporary and permanent injunction enjoining users from engaging in activities on Alley No. 5 that might interfere with access to Portage Lake. However, I respectfully dissent from that part of the majority opinion that reverses and remands this case for trial as to the question of the withdrawal of the dedication.

Defendants first argue that the trial court erred in failing to apply the presumption of public acceptance under MCL 560.255b and in finding that plaintiffs had established that the offer to dedicate had been withdrawn. I agree.

We review the grant or denial of a motion for summary disposition de novo. *Ditmore v Michalik*, 244 Mich App 569, 574; 625 NW2d 462 (2001).

Generally, a valid statutory dedication of land for a public purpose requires two elements: (1) a recorded plat designating the areas for public use; and (2) acceptance by the proper public authority. The acceptance must be timely, and it must be accomplished by a public act either formally confirming or accepting the offer of dedication, and ordering the opening of such street, or by exercising authority over it, in some of the ordinary ways of improvement or regulation. A court has jurisdiction to vacate land that has been dedicated for

public use but has not been accepted by public authorities. [*Higgins Lake Prop Owners Ass'n v Gerrish Twp*, 255 Mich App 83, 113; 662 NW2d 387 (2003) (internal citations omitted).]

“[A]cceptance of dedicated parcels may be (1) formal by resolution; (2) informal through the expenditure of public money for repair, improvement and control of the roadway; or (3) informal through public use.” *Marx v Dep't of Commerce*, 220 Mich App 66, 77; 558 NW2d 460 (1996) (internal citations omitted). As long as the plat proprietor or his successors took no steps to withdraw the offer to dedicate, the offer is treated as continuing. *Vivian v Roscommon Co Bd of Rd Commr's*, 433 Mich 511, 519-520; 446 NW2d 161 (1989).

Acceptance may also be presumed by operation of MCL 560.255b(1), which provides:

(1) Ten years after the date the plat is first recorded, land dedicated to the use of the public in or upon the plat shall be presumed to have been accepted on behalf of the public by the municipality within whose boundaries the land lies.

(2) Presumption conclusive unless rebutted. The presumption prescribed in subsection (1) shall be conclusive of an acceptance of dedication unless rebutted by competent evidence before the circuit court in which the land is located, establishing either of the following:

(a) That the dedication, before the effective date of this act and before acceptance, was withdrawn by the plat proprietor.

(b) That notice of the withdrawal of the dedication is recorded by the plat proprietor with the office of the register of deeds for the county in which the land is located and a copy of the notice was forwarded to the state treasurer, within 10 years after the date the plat of the land was first recorded and before acceptance of the dedicated lands.

Our Supreme Court in *Vivian*, *supra* at 521-522, held that MCL 560.255b operates retroactively.

As noted in the majority opinion, we recently applied the presumption in *Higgins Lake*, *supra* at 116 and found that, when the statutory presumption applies, the burden shifts to the party wishing to vacate the plat to show that the offer was withdrawn. “Offers are deemed withdrawn when the proprietors use the property in a way that is inconsistent with public ownership.” *Kraus v Dep't of Commerce*, 451 Mich 420, 431; 547 NW2d 870 (1996). Whether acts by private property owners operate as a withdrawal of an offer to dedicate property to public use is dependant on the specific facts and circumstances of each case. *Id.* at 430.

In this case, plaintiffs’ evidence consisted primarily of testimony by plaintiff Craig Smith whose grandparents purchased the lot next to Alley No. 5 in 1945. Smith’s parents then acquired the property and subsequently devised it to Smith and his sister, plaintiff Laura Neimi. Smith’s grandparents had constructed the house and pump house, which the parties agree encroach on the alley by six inches and three feet respectively. Smith recalled that his grandparents placed fill in the alley sometime in the late 1940’s or early 1950’s. Smith also testified to some occasional and incidental uses of the alley for hanging clothing, leashing dogs, camping, picnicking, and

parking vehicles. Smith testified that neither plaintiffs nor their predecessors had ever kept anyone from using the alley.

Plaintiffs' best evidence of intent to withdraw the offer of dedication are the encroachments by the house and pump house built over fifty years ago. However, these encroachments are minor and seem likely to be a mistake in the boundary line rather than a conscious attempt to withdraw the offer to dedicate. There is no other evidence of physical impediments to public use of the property, and plaintiffs admitted that there has never been any effort to keep the public off the alley.

“What qualifies as inconsistent use will depend on the circumstances of each case and acquiescence by one of the parties to the other party's use of the property will often be pivotal. . . . We observe that examples of inconsistent use have included erected buildings, fenced-in enclosures, and planted trees.” [*Id.* at 431.]

In the instant case, plaintiffs have failed to show inconsistent use of Alley No. 5 to the extent necessary to demonstrate withdrawal of the offer to dedicate by either themselves or their predecessors.

The trial court erred in failing to apply the statutory presumption of acceptance under MCL 560.255b, choosing instead to focus on whether there were significant numbers of individuals from outside the subdivision using the alley and whether the actual public use was concurrent with formal or informal acceptance by some public authority. While some level of control by a public authority is required to establish acceptance under the highway-by-user statute, MCL 221.20, *Kalkaska Co Road Comm v Nolan*, 249 Mich App 399, 401-402; 643 NW2d 276 (2001), the trial court erroneously applied this standard to acceptance of an offer to dedicate under the Land Division Act, MCL 560.101 *et seq.* I cannot agree that the evidence presented creates a genuine issue of material fact on this issue. I therefore would reverse the order granting summary disposition in favor of plaintiffs and remand this case to the trial court for entry of summary disposition in favor of defendants with regard to the matter of acceptance of the relevant dedication.

/s/ Janet T. Neff